

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY EARL ROTTINGHAUS,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 252546

Wayne Circuit Court

LC No. 03-008085-01

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(f)(force or coercion used to accomplish sexual penetration resulting in personal injury), and second-degree criminal sexual conduct, MCL 750.520c(1)(f)(force or coercion used to accomplish sexual contact resulting in personal injury). He was sentenced to identical concurrent terms of 3½ to 20 years' imprisonment for the convictions. Defendant appeals as of right. We affirm defendant's convictions, but remand for correction of his sentence on the conviction for second-degree criminal sexual conduct.

Defendant's first argument on appeal is that there was insufficient evidence to support his convictions. We disagree.

This Court reviews de novo an insufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A defendant may be found guilty of first-degree criminal sexual conduct under MCL 750.520b(1)(f) if he engaged in sexual penetration with the victim, used force or coercion to accomplish the penetration, and caused personal injury to the victim. *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). A defendant may be found guilty of second-degree criminal sexual conduct if he engaged in sexual contact with the victim, used force or coercion to accomplish the sexual contact, and caused personal injury to the victim. MCL 750.520c(1)(f).

Here, defendant's sole argument with respect to both convictions is that there was insufficient evidence to prove the element of personal injury. "'Personal injury' means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(l). "Personal injury" includes bodily injury or mental anguish; the physical injuries need not be permanent or substantial, and mental anguish may be established by evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind. *People v Mackle*, 241 Mich App 583, 596-597; 617 NW2d 339 (2000). This Court has found that there was sufficient evidence of "bodily injury" when a victim "sustained bruises, welts, or other marks to her hands, wrists, shoulder, groin and buttocks," *People v Himmelein*, 177 Mich App 365, 377; 442 NW2d 667 (1989), and when a victim's neck was "tender" several hours after the sexual assault, *People v Perry*, 172 Mich App 609, 621; 432 NW2d 377 (1988).

Here, the victim had very red and sore "point tenderness" just inside her vagina, was "torn down below, and . . . was . . . bleeding," and she had a 2 by 2 ½ centimeter reddened area just above her left breast, caused by defendant biting the victim, that still showed up in a picture that was taken two days before trial. Because physical injuries need not be permanent or substantial, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that the victim suffered "bodily injury." *Mackle, supra* at 596-597. Therefore, sufficient evidence was presented to establish "personal injury." Accordingly, there was sufficient evidence to support defendant's convictions.

Defendant's second argument on appeal is that numerous allegedly improper remarks and arguments by the prosecutor denied him a fair and impartial trial. We disagree.

Defendant properly preserved his arguments that the prosecutor "disparaged" him and argued facts not in evidence. However, defendant failed to preserve his argument that the prosecutor improperly "vouched" for the victim. When reviewing a claim of prosecutorial misconduct, this Court evaluates the claim on a case-by-case basis to determine whether the prosecutor's remarks, viewed in context, denied the defendant a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). A claim of prosecutorial misconduct that is not preserved by objection at trial is reviewed for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is merited only if the plain error caused the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.* at 454. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra* at 438.

In regard to defendant's argument that he was denied a fair and impartial trial when the prosecutor improperly argued facts not in evidence, specifically the prosecutor's comments regarding the possibility of having sex without leaving semen in the vagina, defendant's argument fails. A prosecutor may not argue facts not in evidence or mischaracterize the evidence, but the prosecution may argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). During a prosecutor's closing argument, he may argue the evidence and make reasonable inferences to support his theory of the case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). A prosecutor's remarks are to be considered in light of defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003).

Here, viewing the prosecutor's comments in context and taking the defense arguments and established evidence into consideration, and because the comments were in response to the stipulated fact that defendant did not leave any semen in the victim, the comments can be characterized as a reasonable, commonsense argument inferred from the established evidence. Furthermore, given the fact that defendant admitted to having sex with the victim, the comments neither prejudiced defendant nor denied him a fair and impartial trial. The comments do not amount to prosecutorial misconduct.

In regard to defendant's argument that the prosecutor "disparaged" defendant and defense counsel when he stated, "It's hard to catch the devil with a knitting needle," the argument fails. A prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). A prosecutor may not intentionally inject into trial inflammatory statements with no apparent justification except to arouse prejudice. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995).

Here, the prosecutor's comment arguably interjected an issue broader than the guilt or innocence of defendant without a proper purpose justifying the comment. However, given the fact that the comment was stricken by the trial court and that the comment's meaning is not readily apparent, we find that the comment did not deny defendant a fair and impartial trial. Furthermore, the trial court specifically instructed the jury that the lawyers' statements cannot be considered as evidence. Reversal is unwarranted.

In regard to defendant's argument that the prosecutor improperly told the jurors that he personally thought that the victim was a credible witness, defendant's argument, again, must fail. A prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness, but he may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Thomas, supra* at 455. Furthermore, a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

In *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), this Court found that the prosecutor's comments that the victim's testimony was honest, painful, and straightforward, constituted improper vouching. This Court, however, held that the improper comments did not

warrant reversal because it was not objected to and “a prompt, curative instruction could have removed any taint the comments may have caused.” *Id.* And, furthermore, “the trial court specifically instructed the jurors that it was their duty to determine the credibility of witnesses and that the lawyers' statements and arguments should not be considered evidence.” *Id.* at 382-383.

Here, during the prosecutor's closing argument, he suggested that the victim was telling the truth, even though she did not tell anyone about the rape until three days later, when he stated, “it is something that people don't – if it really did happen, don't just throw it out there.” During the prosecutor's rebuttal argument, he further suggested that the victim was telling the truth when he stated that “[it's] up to you to make the final decision in this case. I think the witness was credible. I think she told you the truth about what happened that evening.”

In regard to the prosecutor's comments made during his closing argument, we find that the comments did not improperly “vouch” for his witness. The comments do not suggest that the prosecutor had special knowledge, but rather, his remarks reflected commentary on the evidence that the victim did not tell her parents about the rape until three days later and suggested that such a course of action is not uncommon. Therefore, the prosecutor's comments during his closing argument did not constitute improper vouching. *Howard, supra* at 548. There was no plain error.

In regard to the prosecutor's comments made during his rebuttal argument, we find that the comments did improperly “vouch” for his witness. The prosecutor was not using facts to suggest that his witness was credible, but rather, he gave a direct personal opinion without reference to the evidence. These comments are similar to the impermissible comments made in *Knapp*. As was the case in *Knapp*, however, the improper comments do not warrant reversal because the trial court specifically instructed the jurors that it was their duty to determine the credibility of witnesses and that the lawyers' statements and arguments cannot be considered evidence. We conclude that defendant fails to establish the requisite prejudice.

Defendant's final argument on appeal is that he entitled to resentencing on his second-degree criminal sexual conduct conviction because his 20-year maximum sentence exceeded the statutory limit. The prosecution agrees that the trial court erred in setting the maximum at 20 years.

A sentence that exceeds statutory limits is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Second-degree criminal sexual conduct is a felony punishable by imprisonment for not more than 15 years. MCL 750.520c(2); *People v Armstrong*, 247 Mich App 423, 424-425; 636 NW2d 785 (2001). There is no indication in the record that defendant was sentenced as a habitual offender. Given that the maximum sentence exceeds the statutory limit, we find that the trial judge committed plain error when he sentenced defendant to 3 ½ to 20 years in prison on the conviction for second-degree criminal sexual conduct. It would appear that the trial court intended to sentence defendant to the statutory maximum and simply misspoke or made an inadvertent error. Considering that the maximum sentence was set at 20 years, we see no reason not to simply have it reduced to the statutory limit of 15 years without need for resentencing, especially where the sentence is concurrent with the 3½- to 20-year sentence for

first-degree criminal sexual conduct. We therefore remand for clerical correction of the judgment of sentence such that it reflects a maximum sentence of 15 years' imprisonment on the conviction for second-degree criminal sexual conduct.

We affirm defendant's convictions, but remand for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Stephen L. Borrello